No. 73-849

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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PERRY RUSSELL TUNNELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D. C. 20530.*

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After a jury trial, petitioner was convicted in the United States District Court for the Eastern District of Texas on three counts of having willfully attempted to evade his individual income taxes by filing false and fraudulent tax returns, in violation of Section 7201 of the Internal Revenue Code of 1954. Concurrent sentences of four years' imprisonment on each of the three counts were imposed.

Petitioner seeks review on the grounds that the evidence was insufficient, that the prohibition of 28 U.S.C. 1865(b)(5) against jury service for persons under indictment for federal or state felonies is unconstitutional, that certain evidence was erroneously admitted, and that the jury instructions were improper.

The evidence showed that petitioner operated two lounges, a hotel, a trailer park, and a farm, and that he also received income from oil and gas leases and from prostitution in connection with the hotel and one of the lounges (R. 394-397, 445-452, 648-650, 820-821, 849-850).[1] The government reconstructed petitioner's income by the net worth method, which showed taxable income of $9,236.73 in 1965, $35,579.77 in 1966, and $34,783.42 in 1967, or a total of $79,599.92 of taxable income for the three years. Petitioner, however, reported a net loss on his tax returns for these years (R. 783-785).

1. In challenging the sufficiency of the evidence (Pet. 24-35), petitioner does not seriously question the net worth figures, which showed a true taxable income for the three years of almost $80,000 compared to the net loss reported on the tax returns. There were obviously substantial tax deficiencies for each of the years, and the filing of the false returns constituted willful attempts to evade those taxes. The only remaning necessary element for the government

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[1] "R." references are to the record appendix in the court of appeals.

to prove was willfulness, *Sansone* v. *United States*, 380 U.S. 343, 351, and the jury could readily infer that element from the consistent pattern of large understatements of income and petitioner's failure to include all of his income in his books and records, *Holland* v. *United States*, 348 U.S. 121, 139.

2. Equally without substance is the argument (Pet. 6-9) that 28 U.S.C. 1865(b)(5) is unconstitutional because it prohibits persons under indictment for state or federal felonies from serving on petit juries in federal courts. Apart from the fact that no such allegation of unconstitutionality was made in the courts below (*Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16), Congress may exclude from jury service any person who was under felony indictment by either a state or by the federal government, since such persons could be prejudiced against criminal prosecutions.

3. Petitioner contends (Pet. 10-11) that the trial court erred in refusing to instruct the jury (R. 1068, 1072-1073) that the tax law does not penalize frank differences of opinion and errors made despite the exercise of reasonable care, because such errors are corrected by the assessment of the deficiency of tax and its collection with interest. As the trial court stated (R. 1068), this point was adequately covered by the other instructions, which made it clear that the issue the jury was to decide was not the exact amount of tax due but whether petitioner had willfully attempted to evade and defeat it.

Petitioner also contends (Pet. 10) that the trial

court erred in admitting in evidence petitioner's income tax returns for 1963 and 1964, the years immediately prior to the prosecution years. These returns were admitted for the limited purpose of showing that petitioner's reported income for those years was not sufficient to permit the accumulation of any undeposited cash on hand as of December 31, 1964 (R. 587, 999, 1088). For this purpose they bore directly on the accuracy of the starting point of the government's net worth analysis, as required by *Holland* v. *United States*, 348 U.S. 121, 133. See *United States* v. *Chapman*, 168 F. 2d 997, 1001 (C.A. 7). There is therefore no basis for petitioner's contention (Pet. 10) that the court's instruction (R. 1058) permitted the jury to use intent in non-prosecution years to supply intent for subsequent years.[2]

4. Finally, petitioner argues (Pet. 12-14) that he was improperly denied pretrial disclosure of a partial list of the government's witnesses, *i.e.*, those who would link petitioner with the receipt of illegal income. In a non-capital case, the granting of a defendant's request for a list of adverse witnesses is a

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[2] There is also no merit in petitioner's contention (Pet. 17, 31-32) that the trial court erred in admitting evidence that petitioner had engaged in prostitution activities during the prosecution years. Such evidence was admissible to prove a likely source from which some of the unreported income may have come. *United States* v. *Chapman*, 168 F. 2d 997, 1001 (C.A. 7). Cf. *Holland* v. *United States*, *supra*, 348 U.S. at 137-138. Petitioner's assertion that the prostitution income was correctly reported on his tax returns is unsupported, for there was no possible way that such a determination could be made from his books and records.

matter within the discretion of the trial judge (*United States* v. *Hancock*, 441 F. 2d 1285, 1286 (C.A. 5), certiorari denied, 404 U.S. 833; *O'Neal* v. *United States*, 411 F. 2d 131, 138 (C.A. 5), certiorari denied, 396 U.S. 827) and petitioner has shown no abuse of discretion.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

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[3] *Will* v. *United States*, 389 U.S. 90 (Pet. 13-14), is not in point. There the Court merely held that mandamus did not lie to vacate the trial judge's pretrial order to the government to disclose the names of certain witnesses. Such a pretrial order was held not to be an abuse of discretion.

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